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Supreme Court, U.S.
FILED
SEP 1 1994
OFFICE OF THE CLERK

No. 93-1782

In The

Supreme Court of the United States

October Term, 1993

RHETTA B. SWEENEY,
Individually and as Trustee of the
MAPLE LEAF TRUST and of the
CANADIAN REALTY TRUST, and JOHN SWEENEY,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
in its capacity as Receiver of
COMFED SAVINGS BANK,
COMFED MORTGAGE COMPANY, INC.,
COMFED ADVISORY COMPANY, INC.,
and DENNIS FUREY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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11 pp

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Petitioners Rhetta B. Sweeney, individually and as trustee of the Maple Leaf Trust and of the Canadian Realty Trust, and John Sweeney respectfully submit this reply brief in further support of their petition for a writ of certiorari and in reply to the brief in opposition by the respondent Resolution Trust Corporation (the "RTC").

I. The RTC Fails to Dispel The Conflict In The Circuits As To The Applicability Of *D'Oench Duhme*

Petitioners have previously demonstrated that the decision of the court of appeals below, in finding the *D'Oench Duhme* doctrine preclusive here, is in conflict with the prevailing law in at least three other circuits. The attempt by the RTC to reconcile these decisions simply glosses over their fundamentally different view of the applicability of the doctrine to tort claims, such as the statutory claim for deceptive practices at issue here.

Thus the fact remains that in *Astrup v. Midwest Federal Savings Bank*, 886 F.2d 1057 (8th Cir. 1989), the United States Court of Appeals for the Eighth Circuit found *D'Oench Duhme* inapplicable to an entirely analogous claim. There, as here, the plaintiff defaulted on a mortgage for the development of residential property units, and the lending S&L subsequently failed. Plaintiff contended that the bank had agreed to provide financing at below market rates, notwithstanding the notes and mortgage calling for interest at the market rate. The court of appeals affirmed the dismissal of the breach of contract claim, finding that *D'Oench Duhme* barred claims to enforce side agreements contradicting the terms of the bank's regularly kept business records — but the court also affirmed the award to plaintiff on the claim for breach of fiduciary duty in respect of misleading the plaintiff as to the applicable interest rates, finding that *D'Oench Duhme* afforded no protection against such tort claims.

Similarly, in the case at bar, petitioners have alleged a variety of deceptive practices in connection with their obtaining a mortgage from ComFed. The mortgage agreement itself remains enforceable by reason of *D'Oench Duhme*, absent any other written agreements satisfying the criteria of § 1823(e), but that does not mean that related claims for deceptive practices are necessarily disallowed. The RTC urges that those tort claims

must be "wholly independent of any agreement" with the bank or unrelated to its regular banking transactions (RTC Br. at 6), but plainly that was not the case in *Astrup*. The tort claim which was sustained there was part and parcel of the mortgage transaction. The Court of Appeals in *Astrup* determined (at 886 F.2d 1059) that:

> *[The D'Oench Duhme] doctrine affords no protection against tort claims against a financial institution*, whether for personal injuries to a motorist in a collision with an armored car bringing money to the S&L office, or for insider profits in a sale of securities violating Securities and Exchange regulations, or *for fraudulently entering into transactions involving discriminatory interest rates, such as the agreements alleged by plaintiffs in the case at bar.* (Emphasis added).

As petitioners have pointed out (Pet. Br. 9-10), the various deceptive practices they have alleged do not turn on the existence of any side agreement; indeed some are evident from the face of the recorded mortgage documents themselves. Pet. Br. at 11 n.1.[1] *Astrup* suggests that *D'Oench Duhme* would not bar petitioners' claim for deceptive practices even if they did depend

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1 The RTC asserts (RTC Br. at 8) that the First Circuit determined that petitioners' claim was premised on an unwritten agreement. In fact, the court pointed out the contrary, that petitioners' statutory claim for deceptive practices asserted that the closing documents themselves were misleading and unconscionable. A7-8. The court found the documents themselves insufficient to establish an "obligation" on the part of ComFed which would meet the requirements of *D'Oench* (A8), but the petitioners' statutory claim did not require a showing of contractual obligation, only a showing of deceptive practices.

Among these deceptive practices was ComFed's violation of 12 C.F.R. § 545.32. A8, F2, 9. This too was evident from the face of the bank's records. Contrary to the conclusion of the court (*see* RTC Br. at 6, n.4), petitioners maintain that ComFed's deceptive representations about compliance with the

on an alleged side agreement — but at the very least, *Astrup* makes clear that, contrary to the RTC's position here, the claim need not be wholly unrelated to a mortgage transaction.[2]

Likewise, the RTC has failed to show that the law in the Fifth Circuit can be reconciled with the decision below here. As petitioners previously demonstrated (Pet. Br. at 12), in *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591 (1991), the United States Court of Appeals for the Fifth Circuit found *D'Oench Duhme* inapplicable to claims under a state's deceptive practices statute arising from a loan transaction with a failed bank where the claim did not necessarily depend on the finding of an actual agreement between the parties. *Id.* at 594. As here, the claim obviously related to a loan agreement and related to the bank's ordinary business — thereby dispelling the RTC's postulate for reconciling the various cases — but the

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loan-to-value limitations in 12 C.F.R. § 545.32 and its failure in fact to comply with those limitations constitutes a deceptive practice as well under Mass. Gen. L. Ch. 93A.

Furthermore, insofar as petitioners' claim for deceptive practices included unwritten representations and misconduct by the bank, in addition to what was reflected in the agreements themselves, *Astrup* does not suggest that that is a critical distinction for purposes of sustaining a tort claim, as distinct from a contract claim.

2 The RTC suggests that the law in the Eighth Circuit in this respect was somehow altered by subsequent decisions. RTC Br. at 9. In fact, however, in *Hanson v. FDIC*, 13 F.3d 1247 (1994), as in *Astrup*, the court found that *D'Oench Duhme* did *not* bar plaintiff's tort claims relating to his loan agreements with the failed bank, because, as here, although the claims all related to the loan agreements they did "not necessarily arise from any agreement." *Id.* at 1252 n.10. In *Oliver v. RTC*, 955 F.2d 583 (1992), the Eighth Circuit dismissed plaintiff's claim for breach of fiduciary duty, pursuant to *D'Oench Duhme*, but only to the extent that it was based on an asserted side agreement. *Id.* at 586. Insofar as the claim, as here, did not require the finding of an agreement, *D'Oench Duhme* did not apply, and the claim was found insufficient only because the allegations did not support a finding of a fiduciary relationship. *Id.*

claim did not necessarily turn on the finding of any agreement, only the finding of deceptive acts and practices.

The RTC points to two Fifth Circuit cases *preceding Garrett* for the proposition that "claims similar to those in this case were barred under Section 1823(e) and *D'Oench Duhme*" (RTC Br. at 10 n.6), but neither case is in fact similar. In *Clay v. FDIC*, 934 F.2d 69 (5th Cir. 1991), the court affirmed dismissal of a negligence claim and a claim for breach of fiduciary duty, because (i) the negligence claim failed as a matter of state law, and (ii) the guaranty contract underlying the claim expressly absolved the bank of any fiduciary duty. In *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989), the court affirmed dismissal of claims for, *inter alia*, fraud and breach of fiduciary duty, based on *D'Oench Duhme*, but again the decision turned on the claims' dependence on finding an actual collateral agreement rather than, as here, merely the bank's engagement in deceptive practices. Insofar as the RTC urges any further implications from *Beighley*, they would appear undermined by the subsequent decision of the Fifth Circuit in *Garrett*.

Finally, the division among the circuits on this issue was most clearly acknowledged by the United States Court of Appeals for the Eleventh Circuit in the companion cases of *Vernon v. RTC*, 907 F.2d 1101 (11th Cir. 1990) ("*Vernon* I"), and *Vernon v. FDIC*, 981 F.2d 1230 (11th Cir. 1993), *reh'g denied*, 990 F.2d 1270 (1992) ("*Vernon* II") (Pet. Mem. at 13). In *Vernon* I, the court, citing *Astrup* with approval, *id.* at 1106 n.3, 1108 n.7, found *D'Oench Duhme* inapplicable to claims of securities fraud by investors in a defunct S&L. The court observed (at 1107) that in virtually all cases where the doctrine has been applied, the party resisting *D'Oench Duhme* was attempting to avoid the enforceability of a mortgage or other monetary obligation owed to the bank. That was not the case in *Vernon* I and is not the case here, where the claim in issue does not seek to set aside the mortgage or reduce petitioners'

obligation thereunder but rather seeks affirmative compensatory relief for deceptive practices. *Vernon* I recognized that as an important distinction:

> [The RTC] would have us extend the *D'Oench* doctrine to preserve all assets, whether actually possessed or receivable, acquired by a federal insurer or its successor in interest from all claims tending to diminish those assets, save those claims clearly supported by the records of the insolvent bank .... We decline to adopt such a rule, however .... Certain claims, such as tort claims, might not appear in the books of a failed bank and yet easily be shown to be valid.

Id. at 1108.

The RTC suggests (RTC Br. at 10) that *Vernon* I is somehow a "limited holding" which does not demonstrate any actual division in the circuits, but any doubt about that was erased in the *Vernon* II decision where, as the RTC acknowledges (RTC Br. at 11 n.7), the court explicitly recognized the conflict among the circuits as to the applicability of *D'Oench Duhme* to tort claims. The court stated (at 1234 n.8):

> We acknowledge there are courts that disagree with our limitation of the doctrine; and perhaps the Supreme Court or Congress will shed light on the intended scope of the *D'Oench* decision in the near future. *See Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990) (an alleged unwritten side agreement need not implicate a specific obligation held by the FDIC); *Timberland Design v. First Service Bank for Sav.*, 932 F.2d 46, 50 & n.4 (1st Cir. 1991) (rejecting the analysis in *Astrup v. Midwest Fed Sav. Bank*, 886 F.2d 1057, 1059 (8th Cir. 1989) that *D'Oench* affords no protection against tort claims); *First State Bank v. City and County Bank*, 872 F.2d 707, 716-17 (6th Cir. 1989) (refusing to limit the *D'Oench* rule to situations

involving the collection of assets and holding the *D'Oench* doctrine to preclude the enforcement of an oral agreement which impacts on the failed institution's liabilities).

Thus, the Eleventh Circuit has expressly pointed out the conflict between the prevailing view on *D'Oench Duhme* in the First Circuit, upon which the decision hereinbelow was predicated, and the views of the Eighth Circuit and the Eleventh Circuit itself.[3] This Court is respectfully urged to respond to the suggestion of the Eleventh Circuit in *Vernon* II and resolve that conflict.

II. The RTC Fails To Dispel The Conflict In The Circuits As To The Permissible Venue Of Petitioners' Action Upon Its Removal By The RTC

Petitioners previously demonstrated that in holding this action was properly removed to the district court for the District of Massachusetts, the court of appeals ruled contrary to the law in the Tenth Circuit and contrary to the plain language of FIRREA. In arguing otherwise, the RTC has misconstrued the ruling below and the related authorities in several key respects.

First, the RTC erroneously concludes that the court of appeals did not resolve whether venue in the District of Massachusetts would have been permissible under FIRREA as it applied at the time of removal. RTC Br. at 13 n.10. In fact, the court not only assumed "arguendo" that such venue would have been improper under FIRREA (as the RTC concedes) but

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3 The RTC contends that after *Vernon* II the "scope of any such conflict," as perceived by the Eleventh Circuit, was "limited" in *OPS Shopping Center, Inc. v. FDIC*, 992 F.2d 306 (1993) (RTC Br. at 10-11, n.7), but, if anything, *OPS* serves only to underscore the confusion about *D'Oench Duhme*. *See also In Re Geri Zahn, Inc.*, 25 F.3d 1539 (11th Cir. 1994). Significantly, too, *OPS* involved a claim against the FDIC to enforce an unrecorded letter of credit; it did not involve claims for deceptive practices or other torts in which enforcement of the bank obligation is not in issue.

expressly determined so. A4-5 n.3. And it did so because no other conclusion could possibly be reached from the face of § 1441a(1)(3) prior to its 1992 amendment. The only issue for the First Circuit was whether FIRREA's removal provision controlled exclusively.

Secondly, as to the court's ruling that FIRREA's removal provision did *not* control, the RTC erroneously determined that the Tenth Circuit did not consider and reject the possible applicability instead of the general venue provision in 28 U.S.C. § 1441(a). In fact, however, the Tenth Circuit affirmed that, as the law existed in 1991, FIRREA's removal provision was "the applicable removal statute" for RTC substitution cases. *RTC v. Westgate Partners, Ltd.*, 537 F.2d 526, 527 (10th Cir. 1991). The court determined that FIRREA's removal provision was "the relevant statutory provision," *id.*, and expressly distinguished it from § 1441(a), "which deals with removal in general." *Id.* at 528.

Third, the RTC mistakenly asserts that it is the petitioners who urged that FIRREA governs the removal here. RTC Br. at 13. In fact, it was the RTC which invoked the FIRREA removal provision at the time it removed the case. Pet. Br. at 17-18, C3, I1-2. It is only now that FIRREA does not suit them that the RTC disavows the applicability of its removal provision.

Fourth, the RTC erroneously argues that untimeliness could be a separate ground for affirmance making it "unnecessary to reach the question presented by petitioners" (RTC Br. at 13 n.10), *i.e.*, whether FIRREA governs the removal of such cases exclusively. In fact, however, as petitioners previously demonstrated (Pet. Br. at 19-20), if FIRREA, rather than the general venue provision, does govern, the basis under which the district court found the motion to remand untimely, *i.e.*, its non-compliance with the requirement of § 1441(c), would be mooted.

Finally, the RTC illogically suggests that the ruling of the court below was validated by the 1992 amendment to the FIRREA removal provision allowing for removal to the district court where the state action is pending. RTC Br. at 14. Of course, though, the fact that the law was changed to allow for the result now urged by the RTC only confirms that that was not the law previously and that removal to the district court in Massachusetts in 1991 was therefore improper.

Conclusion

For the foregoing reasons, as well as those previously presented in the petition, the petition for certiorari should be granted.

Dated: August 31, 1994

Respectfully submitted,

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